No. _____

In the Supreme Court of the United States

October Term, 1993

LARRY NORRIS, Interim Director,
Arkansas Department of Correction
PETITIONER

v.

MICHAEL RAY ORNDORFF
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE UNITED STATES COURT OF APPEALS' DETERMINATION THAT AFTER BRECHT THE CHAPMAN HARMLESS ERROR STANDARD STILL APPLIED IN A HABEAS CASE, IS ERROR?

PARTIES

The parties to this proceeding are Larry Norris, Interim Director, Arkansas Department of Correction, Petitioner, and Michael Ray Orndorff, an inmate on death row in the Arkansas Department of Correction, Respondent. Petitioner files this petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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In The Supreme Court Of The United States
October Term, 1993

LARRY NORRIS, Interim Director,
Arkansas Department of Correction — **PETITIONER**

V.

MICHAEL RAY ORNDORFF — **RESPONDENT**

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Larry Norris, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

On appeal, the Eighth Circuit Court ofAppeals opinion is reported in Orndorff v. Lockhart, 998 F.2d 1426 (8th Cir. 1993). The opinion of the Court is reprinted in slip opinion form in Appendix A. Petition for rehearing and rehearing en banc were denied. Orndorff v. Lockhart, (Case No. 91-3510EA, 8th Cir. September 21, 1993). The opinion of the Court is reprinted in slip opinion form in Appendix B. The opinion of the District Court is unreported and is found in slip opinion form in Appendix C. The opinion of the Arkansas Supreme Court is reprinted in Appendix D.

JURISDICTIONAL STATEMENT

Petitioner asserts that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosectuions, the accused shall enjoy the right... to be confronted with the witnesses against him; . . .

STATEMENT OF THE CASE

Respondent, Michael Ray Orndorff, was convicted of capital murder for the killing of Donald Lehman and sentenced to death. There were three other co-defendants convicted with him, Hoyt F. Clines, James W. Holmes, and Darryl V. Richley, and they also received the death penalty. The victim's daughter, Vickie Lehman, who was an eyewitness to the murder, gave two statements to the police shortly after the crime describing the events of that night. The prosecution then had Vickie Lehman undergo hypnosis before trial to try and help her remember more details about the crime and the killers. The prosecution failed to tell the defense attorneys about the hypnosis. This was discovered during the federal habeas proceedings. The district court found that the prosecutor's failure to inform the defense about the hypnosis was constitutional error but found that it was harmless as to the guilt phase of the bifurcated trial, but held that the error was not harmless as to the penalty phase of the trial. Orndorff v. Lockhart, 707 F.Supp. 1062 (E.D. Ark. 1988). On appeal, the Eighth Circuit Court of Appeals agreed that the error was harmless as to the guilt phase, but remanded the case to reconsider the question regarding the penalty phase. Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S.Ct. 1338 (1991). On remand, the district court found the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). on appeal, the Eighth Circuit held that in spite of this Court's recent decision in Brecht v. Abrehamson, 113 S.Ct. 1710 (1993), the standard to be applied was still the Chapman standard in this habeas case.

While the Eighth Circuit Court of Appeals affirmed the denial of relief as to other co-defendants, it reversed as to Respondent Orndorff finding that the error was not harmless beyond a reasonable doubt. Orndorff v. Lockhart 998 F.2d 1426 (8th Cir. 1993). Petitioner seeks review on certiorari from that decision.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DETERMINATION THAT AFTER BRECHT THE CHAPMAN HARMLESS ERROR STANDARD STILL APPLIED TO THIS HABEAS CASE, IS ERROR.

Respondent Michael Orndorff raised a claim of violation of the Confrontation Clause in his habeas petition. Respondent Orndorff along with Hoyt Clines, James Holmes, and Darryl Richley, was convicted of capital murder for the murder of Donald Lehman, during a robbery of the Lehmans at their residence. Vickie Lehman, daughter of the victim and Virginia Lehman, her mother and wife of the victim, were eyewitnesses to the crime. Vickie Lehman gave a statement to the police the night of the crime and gave another statement a few days later. She and her mother were then hypnotized in an attempt to discover more details about the killers. The defense was not told about the hypnosis until after the direct appeal was concluded. So this issue was not raised in the state court.

The district court found that the prosecutor's failure to inform the defense about the hypnosis was constitutional error but found that it was harmless beyond a reasonable doubt as to the guilt phase of the bifurcated trial, but held that the error was not harmless as to the penalty phase of the trial. Orndorff v. Lockhart, 707 F.Supp. 1062 (E.D. Ark. 1988). On appeal, the Eighth Circuit Court of Appeals agreed that the error was harmless beyond a reasonable doubt as to the guilt phase, but remanded the case to the district court to reconsider the question regarding the penalty phase. Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S.Ct. 1338 (1991). The Court of Appeals instructed the district court to conduct a comparison of Ms. Lehman's trial testimony with the two statements given before her hypnosis, to determine if a Confrontation Clause violation occurred and, if so, whether

it was harmless beyond a reasonable doubt. 906 F.2d at 1232.

On remand, the district court carefully compared the two pretrial statements of Vickie Lehman with her trial testimony, and found that there was no material difference in the accounts given by this witness. He, thus, found that any error was harmless beyond a reasonable doubt. Appendix C, p. 2, 6.

After briefs had been filed, this Court decided Brecht v. Abrahamson, 507 U.S. - , 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The Eighth Circuit Court then requested additional briefs regarding the impact of Brecht on this case. After oral argument, the Eighth Circuit Court of Appeals held that because this Confrontation Clause issue was not raised in state court, there had been no harmless beyond a reasonable doubt anaylsis under Chapman v. California, 386 U.S. 18 (1967), then this Court's decision in Brecht would not apply. Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). The Eighth Circuit Court of Appeals agreed that an analysis under Brecht would normally cover this issue but not in the present case. The Eighth Circuit Court of Appeals thus affirmed the denial of relief as to Clines, Holmes and Richley based on the higher Chapman standard but reversed as to Respondent Orndorff. Orndorff v. Lockhart, 998 F.2d at 1436. Other circuits which have considered the issue have applied Brecht in collateral review cases. Shaw v. Collins, 5 F.3d 128 (5th Cir. 1993); Tague v. Richards, 3 F.3d 1133 (7th Cir. 1993); Wright v. Dallman, 999 F.2d 174 (6th Cir. 1993); Duest v. Singletary, 997 F.2d 1336 (llth Cir. 1993); Quinn v. Neal, 998 F.2d 526 (7th Cir. 1993); Stoner v. Sowders, 997 F.2d 209 (6th Cir. 1993). They did so without regard to the consideration of the issue by the state court. In fact, it did not matter the result of the issue before the state court as it would not be binding on the federal court or be given deference. See Wright v. Dallman, supra.

The issue in this case is whether the alleged consitutional violation, the State's failure to disclose that one of its witnesses had been hypnotized, constituted harmless error and which standard to apply. This Court has modified

the standard to be applied for reviewing a constitutional violation for harmless error. Brecht v. Abrahamson, 507 U.S.____, 113 S.Ct. 1710 (1993). The new standard is "whether the error 'had substantial and injurious effect or influence in determing the jury's verdict.'" 113 S.Ct. at 1722 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). However, the Eighth Circuit declined to apply this standard. Instead, the Court applied the standard established previously in Chapman v. California, 386 U.S. 18 (1967). The Eighth Circuit Court of Appeals stated as follows:

> We believe that the Brecht rule is based largely on the notion that because the state courts can properly apply the Chapman harmless error standard on direct review, the federal habeas courts need only review those decisions under the Kotteakoq harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitutional error under the Chapman harmless error standard. As a result, we find that rule announced in Brecht does not apply and that the Chapman harmless error standard is the appropriate test in this case.

Orndorff, 998 F.2d at 1430.

This Court applied the standard to the defendant in the Brecht case. The standard is also found in 28 U.S.C. § 2111. This Court found the trial error did not warrant the granting of habeas relief in the case. Brecht v. Abrahamson, supra. Petitioner Norris asserts as he did before the Eighth Circuit that the decision below erred in refusing to apply the Brecht standard in reviewing whether the consitutional error

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[1]Respondent asserts that there is no retroactivity question in this case because: (1) in Brecht v. Abrahamson, supra, this Court applied the standard and found it to be based on prior case law and statute; and (2) in Lockhart v. Fretwell, ___U.S.___, 113 S.Ct. 838 (1993) this Court held that even if the rule is a new rule it can be applied to a case if it benefits the state.

in this case was harmless error.[2]

In Brecht, this Court held that the standard to be applied on collateral review of claims of the trial error type is the Kotteakos standard (substantial and injurious effect or influence) while holding that the standard to be applied on direct review by state courts is the Chapman standard. In Brecht, this Court did not hold that the Kotteakos standard will apply only when the state court does not apply the Chapman standard. That seems an unworkable type of application that could not be applied in a uniform manner.

Collateral review is different from direct review. Brecht v. Abrahamson, 113 S.Ct. at 1719; Wright v. West, 112 S.Ct. 2482, 2490 (1992). While direct review is the principal avenue for challenging a conviction, habeas review is secondary and should be limited. Id. at 1719. The distinction between direct review and collateral review is recognized and discussed in Brecht, 113 S.Ct. at 1720, with this Court finding that different standards have been applied on habeas than would be applied on direct review with respect to matters other than harmless-error analysis. See also Wright v. West, 112 S.Ct. at 2490-2491.

This Court held that this new standard of substantial or injurious effect, would be applied to cases which were trial error type cases. 113 S.Ct. at 1717. These would be errors that occur during the presentation of the case to the jury. Id. at 1717. This type of analysis should be assessed in the context of other evidence presented to determine the effect it might have had on the trial. Id. Because this Court has found that harmless error analysis can apply to a Confrontation Clause violation,[3] and because

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[2]Although the Court below applied the Chapman standard to all four of the cases, it found that the district court had properly denied habeas relief to Clines, Holmes, and Richley. Because the Brecht standard is a more lenient standard, Petitioner asserts that the decision would necessarily be the same as to Clines, Holmes, and Richley if Brecht were applied to this case.

[3]Delaware v. Van Arsdall, 475 U.S. 673 (1986).

this alleged error would be included in the trial type errors mentioned in Brecht, this should be found to be trial error and thus subject to the harmless error analysis found in Brecht.

The Brecht decision did not state that in certain types of cases a different standard would be applied by a federal habeas court depending on the standard applied by the state court on direct review. 113 S.Ct. at 1720. This Court stated in Brecht that there is one standard for collateral review and another standard for direct review. This Court unequivocally holds that the Kotteakos standard is the one to apply in federal habeas cases. There is no caveat discussed or mentioned by this Court in the Brecht case.[4] Thus, the Eighth Circuit opinion in this case is in error in holding the Brecht standard does not apply to this case.

Petitioner will not reapeat the harmless beyond a reasonable doubt argument under Chapman made before the Eighth Circuit Court and the district court. The district court examined the witness' pre-hypnotic statements to the police and compared them with her trial testimony in deciding the harm to the four defendants. This is precisely the type of analysis that this Court found should be done under this less onerous standard. Brecht, 113 S.Ct. at 1717. This Court found that to perform this type of analysis it is necessary to quantitatively assess the error in the context of other evidence presented to determine the effect the error had on the trial. Id; Arizona v. Fulminante, 499 U. S. ____, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991). Petitioner asserts this issue cannot be examined in

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[4]Petitioner asserts that because the district court in this case performed the precise analysis that this Court indicated in Brecht v. Abraham, supra, should be done, there is no need to sent this case back to the district court for reanalysis. If the petitioner has met the more burdensome standard of harmless beyond a reasonable doubt, it has certainly met the lesser standard of substantially influenced.

any other manner. Thus the district court properly decided this claim.[5]

Therefore, the examination must focus on the differences between the prehypnotic statements and the trial testimony of the witness. An analysis of the differences between Vickie Lehman's trial testimony and her two prehypnotic statements along with the other evidence at the guilt and penalty phases demonstrates that any error did not substantially injure or influence the jury's verdict of death. As this Court stated in Brecht v. Abrahamson, 113 S.Ct. at 1717, the federal habeas court must review the evidence in the case to determine if the alleged error was prejudicial to Respondent Orndorff. Petitioner Norris asserts that the record demonstrates that Vickie Lehman's testimony at trial was entirely consistent with the information given to the authorities prior to her hypnosis.

If the Court were to apply the lesser standard of Brecht, Petitioner Norris asserts that Respondent Orndorff's death sentence must be affirmed. The opinions below identified several additions to Vickie Lehmans's prehypnotic statements concerning her trial testimony about Orndorff's behavior which affected the jury's assessment of punishment. The Eighth Circuit noted that at trial Ms. Lehman described Orndorff as "wirey acting" and "squirrely acting." Orndorff v. Lockhart, 998 F.2d at 1433. She also testified that Orndorff also liked to play with the toys on the bar in the main room. Id. The Court of Appeals notes that there was no mention of this behavior in her prehypnosis statements. Id. The opinion notes a difference between Ms. Lehman's trial testimony and her prehypnotic

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[5]Petitioner asserts that because the district court in this case performed the precise analysis that this Court indicated in Brecht v. Abrahamson, supra, should be done, there is no need to send this case back to the district court for reanalysis. If the petitioner has met the more burdensome standard of harmless beyond a reasonable doubt, it has certainly met the lesser standard of substantially influenced.

statements concerning Orndorff's swinging from the chandelier. Id. Although the incident was mentioned in her prehypnotic statements, at trial her testimony was more detailed as to this incident. Id. The opinion also notes that her testimony at trial concerning Orndorff's statement about the neighbors hearing the gunshots, was not included in either of her prehypnotic statements. Id.

When these additions or changes are reviewed in light of the other evidence against Orndorff, Petitioner Norris asserts that there is no substantial or injurious effect and this did not influence the jury's verdict of death. Respondent Orndorff cannot show this to be error under Brecht.

The evidence adduced at the trial established the following:[6] Billy Weaver testified that he went to the police as soon as he heard of the Lehman murder. Weaver testified he had met Orndorff at a party in January four or five days prior to the murder. At the party Orndorff told Weaver he had bought some ammunition for some friends, that he had been stealing and robbing and making some money, and that he was going to pull off a big job and might have to kill someone. Weaver stated Orndorff had some friends at the party, describing one as a big guy weighing 200 pounds with long, scraggly blond hair and wearing wire rim glasses. On the morning after Lehman's murder, Weaver identified the two as Holmes and Richley respectively, pursuant to a photograph show-up conducted by the police on January 9, 1981.

The record is undisputed that the four defendants, including Orndorff, were together on January 8, the night of the murder of Don Lehman. Tammy Baker testified that the four, whom she had met before, came to her house around

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[6]All of the facts are found in: Clines, et al. v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051 (1984); Orndorff v. Lockhart, 707 F.Supp. at 1064-1065; Orndorff v. Lockhart, 906 F.2d at 1232; Orndorff v. Lockhart, 998 F.2d at 1428-1429.

7:30 p.m. She stated Clines had on a ski mask and stuck a gun in her face when she opened the door. Orndorff was swinging around a chain belt which Clines said was his. Tammy said Orndorff then gave the chain belt to Clines. She stated she thought Richley said he knew a man down the road he was going to hit up. When she read in the paper about the Lehman murder the day after it happened, she recognized the composite picture of one of the suspects as being Clines.

Tammy's husband, Steve substantiated much of her testimony. Steve testified that all four wore ski masks when they arrived at 7:30 and that Clines had a gun, described as small like a .22 caliber. Steve described Richley as wearing wire framed glasses and Holmes as being heavy set. He stated Holmes took the gun and stuck it in his pocket. Two of the four sat around in the corner and talked about "robbing some rich old fart" one of them knew. Steve heard Clines ask what they would do if someone fought with them and either Richley or Holmes said they would kill them. The four left around 9:30 p.m. in an older model car with Richley driving, Holmes in front as a passenger and Clines and Orndorff in the back seat.

The four defendants arrived at the Lehman house close to 9:30 p.m. or a little thereafter. The record indicates it takes approximately 10 minutes to travel from the Baker's house to the Lehman residence.

As the jury heard the testimony of Vickie Lehman and her mother, Virginia Lehman (which has not been repeated herein), all four of the defendants were visible to them as they sat in the courtroom. In addition, the State introduced photographs of the four as they appeared at the time of their arrest. Petitioner Norris submits the State's evidence clearly established that Holmes was the fat man, Richley the tall man and Orndorff the small man.

After the crime, the four were seen together by Teresa McDonald, Richley's girlfriend. The four went to the house where Orndorff was living. Teresa testified Richley came in with Clines, Orndorff and Holmes about 10:00 p.m. the night

of the murder, that they acted serious and went straight to the bedroom and changed their shirts, except possibly Orndorff. The record indicates it takes approximately 6 minutes to travel from the Lehman's residence to the Orndorff residence. Holmes, Richley and Teresa ultimately ended up at Richley's apartment about 12:30 a.m. and Teresa saw several guns in the living room, one of which had a fancy picture on it.

The State was further able to link the defendants, including Orndorff, to Lehman's murder by evidence obtained and seized during the police investigation. The guns stolen from the Lehman's home were found in the trunk of Richley's car on the day after the murder. Holmes' palm print was identified as being on the Franchi shotgun and the Browning .22 rifle. Photographs of Richley's car indicated it was similar to the vehicle driven by the defendants and described by Vickie Lehman. Binoculars were also seized from the car which were identified by Vickie as belonging to her father. Pawn records reflected that Richley had purchased an RG Model, .22 caliber revolver, serial number T. 682410 which he had redeemed on December 31, 1980. Ballistics reports established that the bullets retrieved from the chest and abdomen of Lehman were fired from a .22 caliber revolver serial number 668445 turned over to the police and which was identified as belonging to Holmes. Holmes purchased this gun on November 4, 1980 from Wal-Mart. Cotton gloves, a navy stocking cap and box of .22 shells were retrieved from the trash outside Holmes' residence. A Wal-Mart store clerk testified he sold .22 caliber shells to Holmes on December 27, 1980, and to Orndorff on December 11, 1980 and January 2, 1981.

The opinion of the Court of Appeals cites to additions and changes between Ms. Lehman's prehypnotic statements and her trial testimony, however, when these are viewed in light of the other evidence, Orndorff's responsibility for the crimes is still clear. These additions or changes do not change those facts or make them less significant to the jury's consideration of which sentence to impose. Based on the above recited facts, any additions or changes in Ms. Lehman's

prehypnotic statements did not substantially or injuriously affect the jury's assessment of the death sentence as to Orndorff. Petitioner Norris asserts that the jury's assessment of Orndorff's death sentence can certainly be affirmed on the above recited facts. Therefore, the Eighth Circuit Court of Appeals erred in reversing the denial of habeas relief as to Orndorff.

Petitioner Norris asserts that even were this Court to ultimately decide that the Chapman harmless error standard is the correct standard, the error complained of here is still harmless beyond a reasonable doubt. As Judge Arnold correctly noted in his concurrence, the other evidence introduced at trial must be examined in determining whether it affected the sentence imposed on Orndorff. Orndorff v. Lockhart, 998 F.2d at 1438.

This Court has held that harmless beyond a reasonable doubt analysis can apply to a Confrontation Clause issue. Delaware v. Van Arsdall, 475 U.S. 673 (1986). This Court stated that the factors to be considered include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. at 684. The analysis is somewhat different as to the factors to be addressed when the allegedly improper evidence is admitted than when the evidence is not disclosed to the defense. Bundy v. Florida, 479 U.S. 394 (1986). Because the error at issue in this case was the state's failure to disclose the fact of the hypnosis, the appropriate harmless beyond a reasonable doubt analysis is an examination of the differences, if any, between Vickie Lehman's prehypnotic statements and her post-hypnotic trial testimony and whether they are significant. Delaware v. Van Arsdall, supra. This higher standard would only apply in a direct review case and not a collateral review case such as

this. Brecht, supra.

Of course, under the Brecht standard, the focus is not on the witness but on the other evidence that the state presented. Shaw v. Collins, 5 F.3d 128 (5th Cir. 1993). The focus under Delaware v. Van Arsdall, supra, was on the witness and the factors connected to that witness' testimony while under Brecht, the focus is on the other evidence in the trial. As recited above, the facts show that any additions or changes between Vickie Lehman's prehypnotic statements and her trial testimony had no effect on the jury's asssessment and thus is harmless beyond a reasonable doubt. This is because the parts of Ms. Lehman's prehypnotic statements and trial testimony that are the same and which point to Orndorff's responsibilities in this crime, coupled with the other testimony at trial, show the jury's assessment can certainly be affirmed.

While the district court did not state it was following the standard as announced in Kotteakos and Brecht, he did the precise analysis as stated by this Court that should be done and that was in fact done by this Court in the Brecht case. Even in Kotteakos v. United States, 328 U.S. at 764, this Court found that the analysis must include the other evidence that was presented against the defendant.

At the penalty phase of Orndorff's trial, the jury was presented evidence both as to aggravating circumstances and mitigating circumstances. The jury unanimously found at least two aggravating circumstances as to each of the four defendants. The jury found some mitigating as to Orndorff but not unanimously. The jury then unanimoulsy found that the death penalty should be imposed against Orndorff and the other defendants as well.

Petitioner asserts that based upon the evidence presented at the penalty phase, Orndorff's death sentence was the result of the evidence presented there and not solely based on the testimony of Vickie Lehman at the guilt phase of the trial. Based upon the findings by the jury at the penalty phase of the trial, the giving of the death sentence was not substantially influcenced by Vickie Lehman's testimony and

is harmless beyond a reasonable doubt as well.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court state that review on writ of certiorari will be granted when there are special and important reasons therefor. This case presents issues worthy of such review. Petitioner respectfully submits that the United States Court of Appeals, holding that a violation of the Confrontation Clause was harmless beyond a reasonable doubt instead of applying the lesser standard as announced by this Court is incorrect. Thus, based upon the foregoing citations of authority, petitioner respectfully prays that this Court grant review on writ of certiorari.

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APPENDICES

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3510

Michael Ray Orndorff, Appellant, V. A. L. Lockhart, Director, Arkansas Department of Correction, Appellee.	Appeals from the United States District Court for the Eastern District of Arkansas.

No. 91-3512

James William Holmes, Appellant, V. A. L. Lockhart, Director, Arkansas Department of Correction, Appellee.	

No. 91-3513

Hoyt Franklin Clines,

Appellant,

V.

A. L. Lockhart, Director, Arkansas Department of Correction,

Appellee.

No. 91-3514

Darryl Richley,

Appellant,

V.

A. L. Lockhart, Director, Arkansas Department of Correction,

Appellee.

Submitted: June 8, 1992

Filed: July 15, 1993

Before RICHARD S. ARNOLD, Chief Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

Senior Circuit Judge, and MAGILL, Circuit Judge.
HENLEY, Senior Circuit Judge.

We visit this habeas case for the second time. Michael Ray Orndorff, James William Holmes, Hoyt Franklin Clines, and Darryl V. Richley (petitioners) appeal from the judgment of the district court denying their requests for habeas relief under 28 U.S.C. § 2254. Petitioners were convicted of capital murder and were sentenced to suffer the death penalty. The district court found that at trial petitioners were denied their sixth amendment right to confront the witnesses against them. The court granted petitioners partial relief, finding that this error was harmless with respect to their convictions and affected only their death sentences. Respondent Lockhart concedes the error at trial, but contends this error was harmless with respect to the convictions and sentences. We affirmed that part of the decision denying relief and remanded for further consideration. Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S. Ct. 1338 (1991). On remand from this court, the district court held that the error was harmless with respect to the petitioners', sentences and denied their requests for habeas relief. We affirm in part and reverse and remand in part.

I.

Petitioners broke into and robbed the house of Don Lehman in Rogers, Arkansas. In addition to stealing several hundred dollars and some guns, one or more of the petitioners shot and killed Don Lehman and threatened to kill his wife and daughter, who were in the house at the time.

At trial, Don Lehman's daughter, Vicki Lehman, testified in great detail about the murder-robbery. In addition to her trial testimony, she gave the police two statements which were recorded and transcribed: one within hours after the murder and another several days later. Although there are

pretrial statements, there are many similarities in her descriptions of what happened that night.

Vicki Lehman has consistently stated that at approximately 9:45 on the evening of January 8, 1981, she heard the front doorbell ring and got out of bed to go to the door. Vicki met her father in the hall on the way to the door and followed closely behind him. When her father unlocked the door, four men wearing ski masks forced their way into the house and attacked him. Vicki was held at gunpoint by one of the men while two or three others attempted to subdue her father who was struggling. Vicki was ordered to kneel down, face the wall, and put her head in her hands. She could sense that the fight had moved down the hall and into the bedroom. Vicki then heard two gunshots. Moments later, one of the men grabbed her by the back of the hair and led her through the house, searching for money and other valuables.

Vicki has consistently described the four attackers as follows: (1) the tallest man who wore wire rim glasses that were visible through the ski mask, later identified as petitioner Richley; (2) the heavy or biggest man, later identified as petitioner Holmes; (3) the short or smallest man, later identified as petitioner orndorff; and (4) the medium-sized man who removed his mask during the robbery, later identif ied as petitioner Clines. She got a very good look at the man who removed his mask, and within hours after the murder helped an investigator create a composite drawing of that man. Several days later she positively identified petitioner clines in a line-up.

Vicki has also consistently described the sequence of events as she was led through the house. After she heard the gunshots, the tallest man with the glasses grabbed her and demanded to know where some money was. This tall intruder never let go of her until he lef t and constantly had his gun pointed at her head or back. She led him into her bedroom and produced an envelope containing some money she had received for Christmas. From her bedroom, Vicki was taken back down the hall, upstairs to a loft or office area above the

main room, and then back downstairs. She was then led into her parents' bedroom where she saw her father laying motionless on the bed and her mother cowering in the corner. While in that bedroom, the medium-sized man found several hundred dollars in a drawer. He became excited and removed his mask. Then he and the heavy man began tearing out drawers and throwing clothes about the room searching for more money. The smallest man then suggested that she be allowed to call an ambulance for her father.

Vicki was taken into the kitchen area to use the phone. Before she was able to make the call, however, the medium-sized man grabbed the phone from her and stated she was not going to call anyone. Vicki then stared eye-to-eye with this unmasked man. All four attackers were in the kitchen area and they demanded more money and guns. Vicki directed them to the gun cabinet in the living room. The tallest man, still holding Vicki, ordered two of the attackers, the smallest and medium-sized man, to get in the car and ordered the heavy man to remove the guns from the cabinet. The heavy man took the guns out to the car and the tallest man followed.

The police arrested all four petitioners within several days of the murder. After a joint trial, petitioners were convicted of armed robbery and capital murder. The death penalty was imposed on all four[1] Petitioners exhausted their state remedies and filed petitions for habeas corpus relief in federal court. Petitioners raised several claims in their habeas petitions, but only one was found to have merit.

After petitioners had appealed to the Arkansas Supreme Court, they discovered that Vicki Lehman had been hypnotized prior to trial in an attempt to enhance her memory. The prosecutor had arranged for this hypnosis, but failed to inform the defendants or

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[1]In Arkansas, a person convicted of capital murder may receive the death penalty or life imprisonment without parole. Ark. Code Ann § 5-10-110 (1987) ("A person commits capital murder if . . . he commits . . . robbery . . . and in furtherance of the felony . . . he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.").

the trial court. In their habeas petitions, petitioners claimed they were denied their sixth amendment right to confront the witnesses against them because they were denied the opportunity to cross-examine Vicki Lehman about the hypnosis.[2] The district court found that the prosecutor's failure to inform the defendants about this hypnosis was constitutional error. The court further found that this error was harmless with respect to the petitioners' convictions of capital murder, but held that the error was not harmless with respect to the petitioners, sentences. Orndorff v. Lockhart 707 F. Supp. 1062 (E.D. Ark. 1988).

On appeal from that decision, we affirmed the district court's holding that the error did not warrant reversal of the convictions because "(t]he evidence of petitioners' guilt, even without Vicki Lehman's testimony, is overwhelming." Orndorff, 906 F.2d at 1233. We remanded the case, however, with directions for the district court to reconsider the question whether the error was harmless with respect to the petitioners' death sentences. On remand, the district court found the error harmless and denied petitioners, request for habeas relief. Petitioners appeal from that decision.

II.

We begin with the premise that when reviewing a constitutional violation for harmless error, courts traditionally required "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). The Supreme Court has recently altered this premise, holding that the correct harmless error standard in most habeas corpus cases is "whether the error 'had substantial and injurious effect or influence in

2"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U. S. Const. Amend. VI.

determining the jury's verdict.'" Brecht v. Abrahamson, 113 S.Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).[3] This court has recently noted the question whether the Brecht standard applies if the state courts never considered the harmless error issue because they found no error. Hoversten v.. Iowa, No. 92-2402 (8th Cir. July 13, 1993). In Hoversten, however, this court declined to answer that question because the error was not harmless under either standard. Id, slip op. at 6. We now reach the unresolved question.

Brecht reached the Supreme Court after two state appellate courts, a federal district court, and a federal court of appeals had reviewed the error under the man harmless error standard. Petitioners argue that the Court declined to apply the Chapman harmless error standard on collateral review because to do so would undermine "the finality of convictions that have survived direct review within the state court system." Brecht, 113 S.Ct. at 1720 (citations omitted). The Court noted that "(s)tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman," and that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review." Id. at 1721.

We believe the Brecht rule is based largely on the notion that because the state courts can properly apply the Chapman harmless error standard on direct review, the federal habeas courts need only review those decisions under the Kotteakos harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitututional error under the Chapman harmless error

[3]After this case was argued and submitted, the Supreme Court decided Brecht. At this court's request, the parties filed supplental briefs discussing the effect Brecht may have on this case.

standard. As a result, we find that rule announced in Brecht does not apply and that the Chapman harmless error Standard is the appropriate test in this case.

We therefore must determine whether the error in this case "was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 24. More specifically, in the context of this confrontation clause violation, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (listing five factors a reviewing Court should evaluate in making its decision).

In remanding this case, we instructed the district court to conduct its inquiry using the harmless error analysis set forth in Van Arsdall. We noted that the court should compare the prehypnotic statements to the trial testimony "with an eye toward sorting out those things about which Vicki Lehman could testify without the aid of hypnosis (that is, from actual memory) from those things about which she could testify only after being hypnotized." Orndorff, 906 F.2d at 1232. We further stated that "[u]nless this sorting process reveals significant differences, the error should be deemed harmless." Id. (footnote omitted). The district court found there to be a "remarkable consistency" in Vicki Lehman's recitations of the murder-robbery and therefore concluded the error was harmless.

After the district court made its ruling on remand, the Supreme Court decided Yates v. Evatt, 111 S. Ct. 1884 (1991). Petitioners argue that Yates changes the legal test announced

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[4]After Yates was decided, petitioners requested the district court to reconsider its decision. The district court denied this request stating, "The Court will not resolve this question because it is a matter for the Court of Appeals." Orndorff v. Lockhart, No. PB-C-84-300 (E.D. Ark. Oct. 7, 1991) (order denying motions for new trial or hearing).

in Van Arsdall and therefore the case must be remanded because the district court's legal analysis is flawed.[4] Respondent Lockhart argues that Yates deals with harmless error in the context of an improper presumption and therefore is not relevant to this confrontation clause harmless error analysis. We find that Yates is consistent with Van Arsdall and does not require us to remand.

In Yates, it was determined that the trial court's jury instructions created certain presumptions which improperly shifted the burden of proof from the prosecution to the defendant.In analyzing the question whether this unconstitutional burdenshifting jury instruction was harmless, the Court employed a twostep approach. In essence, a reviewing court must first establish "what evidence the jury actually considered in reaching its verdict." 111 S. Ct. at 1893. The purpose of this first step is to determine what evidence may have been considered as tending to prove the improperly presumed fact. The second step is to "weigh the probative force of that evidence [determined in the first step] as against the probative force of the presumption standing alone." Id. The Court concluded that the proper test is "whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." Id.

Petitioners argue that the methodology used in Yates should be "extrapolated" to the present harmless error analysis of this confrontation clause violation. They argue that Yates requires a reviewing court to first determine what evidence the jury considered on the issue of the death sentence. According to petitioners, the court must then determine if there are any differences in the pre- and post-hypnotic testimony of Vicki Lehman, and finally determine whether the verdict of death actually rested on the hypnotically enhanced testimony. We agree with petitioners that Yates is instructive of our analysis, but we do not agree that Yates changes the Van Arsdall analysis.

In analyzing a violation of the confrontation clause for

harmless error, the Court in Van Arsdall stated that:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. at 684. The fifth factor described in Van Arsdall (the overall strength of the prosecution's case) requires us to examine the evidence presented by the prosecution which the jury may have considered in deciding to impose the death sentence. In Lufkins v. Leapley, 965 F.2d 1477 (8th Cir. 1992), we analyzed a confrontation clause violation for harmless error and cited Yates for the proposition that "to determine whether the (error) was harmless beyond a reasonable doubt, we must examine the other evidence introduced at trial and determine whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at 1481.

In sum, our analysis under Yates, Van Arsdall and Lufkins must proceed as follows. We must first compare the pre- and post-hypnotic statements to determine if any "significant differences" exist. If no significant differences are found, the error is deemed to be harmless. If, however, significant differences do exist, we must determine if the variations nevertheless are harmless. To accomplish that task, we assume that Vicki Lehman had been cross-examined about the hypnosis, and we also assume that the damaging potential of that cross-examination was fully realized. See Van Arsdall, 475 U.S. at 684. That is, we assume the jury was made aware

of any changes in Vicki Lehman's story after the hypnosis, as well as the possibility of "confabulation," "suggestibility," and "memory-hardening" that is associated with hypnosis.[5] After making these assumptions, we must determine if we can still say that the error was harmless beyond a reasonable doubt. To determine whether the defendants' inability to cross-examine Vicki Lehman about the hypnosis did not contribute to the jury's imposition of the death penalty, we must examine the evidence introduced at the trial which supported the verdict, as well as the other factors listed in Van Arsdall.

III.

We review the district court's harmless error analysis de novo, as a mixed question of law and fact. See,, e.g., Gunn v. Newsome, 881 F.2d 949, 964 (llth Cir. 1989) (en banc); Graham v. Wilson, 828 F.2d 656, 659-60 (10th Cir. 1987). We therefore begin our analysis, as did the district court, with a comparison of Vicki Lehman's pre- and post-hypnotic statements. on appeal, petitioners claim Vicki Lehman made 134 post-hypnotic statements which contain significant variations from her two prehypnotic statements. They contend 83 of the statements are "new" and 51 of the statements are "changed" from her prehypnotic statements.[6]

Petitioners emphatically claim that Vicki Lehman has been inconsistent in remembering the number of guns she saw.[7] Petitioners argue that Vicki's pre-hypnotic statements indicate that at different times she saw either two or three guns, while at trial she testified that all four petitioners had

[5]The dangers associated with using hypnotically enhanced testimony in a criminal trial are discussed in some detail in Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1988) (en banc) (citing Rock v. Arkansas, 483 U.S. 44, 58-60 (1987)).

[6]We refer to these statements as "New Statements Nos. 1-83" and "Changed Statements Nos. 1-51" as they are numbered in petitioners' briefs.

[7]This claim is made in Changed Statement No. 1.

guns.

Vicki Lehman has stated that she remembered seeing the petitioners with guns at two distinct times during the robbery. The first instance was immediately after the petitioners forced their way into the house. Vicki stated in her second prehypnotic statement that when the intruders forced their way in the door, three of the men pointed their guns at her for an instant while the fourth man attacked her father. Of those three men with guns, one then turned to the fight with her father, the tallest man grabbed her and held her at gunpoint, and the smallest man stood nearby with his gun. In her first statement, Vicki stated that two men immediately began wrestling with her father and the other two had their guns on her. In any event, Vicki has never wavered from her statement that petitioner Richley, the tallest man, had a gun. She saw the gun pointed at her and felt it pressed to her head and back throughout most of the ordeal. In addition, she has stated twice (once in the first pre-hypnotic statement and once in the second) that petitioner Orndorff, the smallest man, had a gun when he first entered the house.

The second instance Vicki remembered seeing guns was later that night when all four petitioners were with her in the kitchen. She recounted this event consistently in both of her pre-hypnosis statements. Vicki was taken to the kitchen from her parents' bedroom to call an ambulance, but petitioner Clines intervened and ripped the phone from the wall. Moments later, three of the petitioners stood in front of her with their guns. At trial, Vicki testified that she believed at that moment all four men had guns in their hands, one at her back and three in front of her. She testified later on cross-examination, however, that it was possible that there were only two guns pointed at her, but "it seem[ed] like" there were three guns in front of her.

In sorting through these statements, we conclude, as did the district court, that there is no material or significant difference between Vicki Lehman's pre- and post-hypnotic

statements concerning the number of guns involved in this crime. She indicated before and after hypnosis that at least three of the petitioners, and possibly all four, carried guns.

Petitioners argue that Vicki Lehman's pre-hypnotic statements indicate that only three of the petitioners were in the bedroom at the time Don Lehman was murdered, but that her trial testimony places all four in the bedroom when the shots were fired.[8] In her first pre-hypnotic statement, Vicki clearly indicated that the tallest man, Richley, stayed with her in the hall while the others were in the bedroom. In her second pre-hypnotic statement, however, Vicki was less sure that the tall man stayed with her. She indicated that she had her head down on the floor and that he could have gone into the bedroom with the others. Moreover, her second pre-hypnotic statement indicates that she was not positive that the man who originally grabbed her was the same man that grabbed her after the shots were fired. At trial, Vicki admitted on cross-examination that it was possible that not all of the petitioners were in the bedroom at the time she heard the shots fired.

Perhaps the most dramatic addition to Vicki Lehman's pre-hypnotic statements is her trial testimony about the behavior of petitioner Orndorff while inside the house.[9] At trial, she described Orndorff as "wirey acting" and "squirrely-acting." She testified that Orndorff liked to play with the little toys located on a bar in the main room and specifically testified that he liked to pull down the lever on the toy slot machine. There is no mention of this behavior in her prehypnotic statements. She also stated that "this little guy, the guy who was darting around all night, he kind of ran through there and swung on a chandelier and screamed real loud like he

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[8]New Statements Nos. 28 and 29

[9]New Statements Nos. 31-36, 40, 41, 80 and 81 and Changed Statements Nos. 20 and 38.

was happy or something." This incident allegedly occurred within minutes of Don Lehman's murder as Vicki was being taken into the kitchen to use the phone. The only prehypnosis mention of Orndorff's behavior in this regard was in response to a question by the police about the broken glass in the dining room. Vicki replied, "This happened later right before they left. He [referring to Orndorff] just went through there and grabbed it . . . ." At trial Vicki also described an incident that occurred in her parents' bedroom while her father lay dying on the bed. She stated that the

> smaller guy was kind of kicking around through the - - through the clothes and somebody commented that they'd better get out of there, that the neighbors had probably heard the guns and the smallest guy looked out the window. I can remember seeing him look out the window and he said something, I'm not real sure what he said, something about, 'The neighbors will see us,' or something.

This incident is not mentioned in either of the pre-hypnotic statements.

Petitioners also claim that Vicki Lehman changed her statements regarding petitioner Holmes' involvement. At trial, Vicki testified that after the phone was ripped off the wall, all four petitioners were with her in the kitchen "and they said, 'Where's any more money or where's some jewelry.' I can remember the big guy going, 'Guns. Guns. We know you have guns."[10] Petitioners claim this testimony is significantly different from her first pre-hypnotic statement in which she indicated that all three petitioners standing in front of her at that time demanded the guns, and from her second pre-hypnotic statement in which she said that the unmasked man, petitioner Clines, demanded the guns. Although her trial testimony is inconsistent with her second pre-hypnotic

[10]Changed Statement No. 44.

statement, it is not significantly different from her first pre-hypnotic statement in which she indicated that petitioner Holmes was one of the three men standing in front of her demanding guns.

At trial, Vicki testified that petitioner Holmes was the first one on her father when the petitioners forced their way through the door.[11] Petitioners claim this is a significant change from her pre-hypnotic statements. In both the pre-hypnotic statements, however, petitioners Holmes and Clines were immediately on her father as soon as the door opened and petitioners Richley and Orndorff stayed by her. The fact that at trial Vicki identified Holmes as being the first of two attackers who immediately pounced on her father is insignificant.

Some of the statements identified by the petitioners are not of any real consequence to the jury's determination of the sentence for various reasons. Some deal with events before the intruders broke into the house[12] or after the intruders left.[13] Several of the statements contain physical descriptions of the intruders[14] and, in particular, their shoes.[15] Others are descriptions of events that occurred during the robbery and are simply not new or changed.[16]

We can describe the remaining new or changed statements as adding detail, color, vividness, and perhaps credibility to Vicki Lehman's pre-hypnotic statements. some of these statements describe in greater detail what occurred

[11]Changed Statement No. 2.

[12]New Statements Nos. 63-66 and 83.

[13]New Statements Nos. 49-62 and Changed Statements Nos. 45 and 46.

[14]New Statements Nos. 37-39.

[15]Changed Statements Nos. 13, 14 and 47-50.

[16]New Statement No. 30 and Changed Statements Nos. 32-37 and 42.

immediately after the petitioners forced their way into the house.[17] Others add detail to the actual fight that ensued. [18]These latter details are indeed new statements because Vicki's pre-hypnotic statements indicated that she only "sensed" that the fight had moved into the bedroom. At trial she described her father getting away from the petitioners and being chased down the hall. Many of the statements describe various details as she walked from room to room with the intruders.[19] Several statements deal with Vicki's own thought processes or feelings during the robbery.[20] Other statements describe her mother's actions.[21] When viewed as a whole, these variations may have enhanced Vicki Lehman's credibility and therefore could have affected the jury's decision. However, as we noted in our prior decision, the 'error is not harmful simply because the jury might have found her testimony less credible had defense counsel been able to probe the issue of her hypnosis on cross-examination." Orndorff, 906 F.2d at 1232.

The district court found that no significant differences existed between the pre- and post-hypnotic statements and therefore determined the error to be harmless without discussing the analysis set forth in Van Arsdall. We believe there to be enough variation, however, to warrant an examination of the differences in light of the Van Arsdall factors and we may make our own harmless error determination without remanding to the district court. See Yates, 111 S. Ct.

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[17]New Statements Nos. 1-12, 71-73, 78 and 79 and changed statements No. 3-8 and 15.

[18]New Statements Nos. 13-23.

[19]New Statements Nos. 42-48, 67, 69, 70, 74-77 and 82 and Changed Statements Nos. 9-12, 16-19, 21-26, 30, 31, 39, 41, 43 and 51.

[20]New Statements Nos. 24-27 and 68.

[21]Changed Statements Nos. 27-29 and 40.

at 1895 ("Although our usual practice in cases like these is to reverse and remand for a new determination under the correct standard, we have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance."); see also Lufkins, 965 F.2d at 1481 (holding that inweigh in favor of petitioners. First, Vicki Lehman's trial testimony was very important to the prosecution's case; the prosecutor repeatedly said so to the jury. See Orndorff, 707 F. Supp. at 1068. Second, her testimony was certainly not cumulative since she was the only occurrence witness, other than her mother who saw and remembered very little, to testify for the state. Third, the only person to either corroborate or contradict her testimony on any material issues was petitioner Holmes. And fourth, the defense attorneys understandably cross-examined Vicki rather gingerly about any variations that they discovered in her trial testimony.

This brings us to our discussion of the fifth factor, the overall strength of the prosecution's case. Petitioners argue that they are entitled to an individualized evaluation and we agree. In this case, the prosecution's case against each defendant for the death penalty was different and we believe Yates and Van Arsdall require us to evaluate the case against each petitioner individually. For each petitioner, we will consider the variations in Vicki Lehman's testimony (that is, those things about which she could testify only after hypnosis) together with the evidence of aggravating and mitigating circumstances, and determine if we can nonetheless say that the error was harmless beyond a reasonable doubt.

We find the prosecution's case against petitioner Richley for imposition of the death penalty was strong. The jury found that all three applicable statutory aggravating circumstances

existed[22] and that no mitigating circumstances existed. Vicki Lehman consistently described him as the leader of the group, and consistently stated that he threatened to kill her. At the penalty phase of the trial, the prosecution presented evidence that Richley had planned and executed a series of armed robberies in the months prior to the Lehman murder. The only variation in Vicki Lehman's statements which may have affected Richley's sentence was her testimony that all four petitioners were in the bedroom when the shots were fired. Although Vicki's first pre-hypnotic statement indicated that Richley was not in the room at the time the shots were fired, her second pre-hypnotic statement indicated that Richley could have been in the room. We can say, however, beyond a reasonable doubt that the error in this case did not contribute to petitioner Richley's death sentence.

We find that the prosecution's case against petitioner Holmes for imposition of the death penalty was strong. More importantly, we find that few if any of the variations in Vicki Lehman's statements were material to the prosecution's case against Holmes. The variations concerning Holmes involved Vicki stating that Holmes was the first man on her father and that Holmes was demanding the guns. As we discussed above, these statements are not really variations at all, and to the extent they are different, the differences are insignificant. The prosecution presented evidence which linked Holmes to several of the robberies allegedly committed by Richley. The jury found that all three statutory aggravating circumstances existed,

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[22]The jury was given a verdict form which listed the following three aggravating circumstances: "1. [Petitioner] previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person." See Ark. Code Ann. § 5-4-604(3) (1987). "2. In the commission of the capital murder, [petitioner] knowingly created a great risk of death to a person other than the victim." See id. § 5-4-604(4). And, "3. The capital murder was committed for pecuniary gain." See id. § 5-4-604(6).

and that no mitigating circumstances existed. The error in this case did not contribute to petitioner Richley's death sentence beyond a reasonable doubt.

We also find that the prosecution's case against petitioner Clines for imposition of the death penalty was strong and that few if any of the variations in Vicki Lehman's testimony were material to the prosecution's case against Clines. Vicki's pre-hypnotic statements consistently identified Clines as one of the two men immediately upon her father and consistently placed him in the bedroom at the time of the murder. Moreover, Vicki consistently described Clines as the man who ripped the phone from the wall and prevented her from calling an ambulance for her father. The jury found all three aggravating circumstances existed and unanimously found that mitigating circumstances did exist by virtue of Clines' electrocution[23] and his excessive drinking. One or more of the jurors found that Clines suffered from a personality change after the electrocution. Because there are no significant variations in Vicki Lehman's testimony which may have affected the jury's decision to sentence Clines to death, we can say beyond a reasonable doubt that the error in this case did not contribute to petitioner Richley's death sentence.

We find that the prosecution's case against petitioner Orndorff for imposition of the death penalty was the weakest in this case. We also find that the variations in Vicki Lehman's testimony about Orndorff's behavior were the most significant. The jury found that only two of the three aggravating circumstances existed (the jury did not find that Orndorff created a great risk the death to a person other than the victim)

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[23]In 1979, Clines was accidentally electrocuted while at work. At the penalty phase of the trial, evidence was submitted that Clines began drinking excessively and experienced a drastic personality change as a result of the accident. The prosecution also presented evidence that even before the accident, Clines drank excessively and had been convicted of robbery.

and one or more of the jurors found that two mitigating circumstances existed (that Orndorff was acting under unusual pressures or influences or under the domination of another person and that Orndorff was an accomplice and his participation was relatively minor). We cannot say beyond a reasonable doubt that the variations in Vicki Lehman's testimony did not contribute to the jury's decision to sentence Orndorff to death. Without Vicki Lehman's descriptions of Orndorff playing with toys, swinging from the chandelier, and looking out the window for the neighbors, the jury may have sentenced Orndorff to life imprisonment rather than death.

We therefore affirm the district court's denial of habeas relief to petitioners Richley, Holmes, and Clines. We reverse the denial of habeas relief to petitioner Orndorff and, in accordance with our previous decision, Orndorff, 906 F.2d at 1233, we remand the case to the district court with instructions that the court's order granting habeas relief should give the state the option of conducting a new sentencing proceeding or reducing the sentence to life without parole.

RICHARD S. ARNOLD, Chief Judge, concurring in part and dissenting in part.

For the reasons given by the Court, I concur in reversing the denial of habeas corpus relief to Michael Ray Orndorff. I concur also in denying this relief to Hoyt Franklyn Clines and James William Holmes. As to the imposition of the death penalty on Darryl V. Richley, however, I respectfully dissent. I would grant Richley the requested relief because the constitutional error — the denial of the chance to cross-examine Vicki Lehman about her hypnosis — was not harmless beyond a reasonable doubt. I disagree also with the Court's holding that our prior ruling in Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S. Ct. 1338 (1991), prevents us from considering the actual effect of the hypnosis on the credibility of the hypnotized witness.

I.

As the Court has explained, using in a criminal prosecution the testimony of a previously hypnotized witness, even when the defendants were not given the chance to cross-examine the witness about the hypnosis, does not require automatic reversal. Rather, the Confrontation Clause error, the use of this testimony, is subject to a harmless-error analysis. Delaware v. Van Arsdall, 475 U.S. 673 (1986); Lufkins v. Leapley, 965 F.2d 1477, 1480-81 (8th Cir.), cert. denied, 113 S. Ct. 271 (1992); see also Williams v. Armontrout, 877 F.2d 1376, 1379-81 (8th Cir. 1989), cert. denied, 493 U.S. 1082 (1990) (due-process claim). The Court must find the error to be harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684; Chapman v. California, 386 U.S. 18, 24 (1967). Van Arsdall provides a list of five factors to be considered in analyzing the harmfulness of Confrontation Clause errors. Van Arsdall, 475 U.S. at 684. Before applying the Van Arsdall criteria to Richley's claim, however, I first consider this Court's interpretation of the holding of our earlier decision in this case, Orndorff v. Lockhart, supra.[1]

In that decision, we said that the Confrontation Clause error — the deprivation of the chance to cross-examine Lehman about her hypnosis — "is not harmful simply because the jury might have found her testimony less credible had defense counsel been able to probe the issue of her hypnosis on cross-examination." Orndorff, 906 F.2d at 1232. The Court today

[1]Although in Orndorff the Court did not decide whether there was a violation of the Confrontation Clause, it was not necessary for it to do so. This was not in issue because the State already had conceded that the use of Lehman's testimony, without disclosure that she had been hypnotized, was a constitutional error. Orndorff, 906 F.2d at 1232.

evidently infers from this that, even if Lehman's testimony after hypnosis differed from or was more detailed than statements she made beforehand, we may not consider, in our harmless-error analysis, those discrepancies and additions serving only to enhance the credibility of her testimony.

I do not read Orndorff's holding as broadly as the Court does. Orndorff held that the mere possibility that hypnosis may have affected Lehman's testimony by rendering it more convincing did not in and of itself mean that the error was harmful. In that case, we vacated the lower court's holding that the 137 variations between Lehman's prehypnosis and post-hypnosis statements were "inherently prejudicial" " Orndorff, 906 F.2d at 1232 (quoting Orndorff, 707 F. Supp. 1062, 1069 (E.D.Ark. 1988)).[2] Instead, we required the District Court to analyze these variations. Orndorff, 906 F.2d at 1232. Thus, Orndorff does not require exclusion from our harmless-error analysis of the color, detail, and vividness that Lehman's post-hypnosis testimony added to her previous statements; it mandates evaluation of the effect of the specific changes and additions on the overall testimony, including, in my view, its credibility.

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[2]The District Court stated that "[a]ll of the instances where Ms. Lehman's trial testimony differed from or added to her previous statements need not be discussed because the court finds that the prosecutor's failure to disclose [the hypnosis] was inherently prejudicial." Orndorff v. Lockhart, 707 F. Supp. 1062, 1069 (E.D. Ark. 1988). The reason for this holding was the effect of hypnosis on trial testimony. Hypnosis has been known to enhance a witness's confidence in her testimony, whether true or imagined, once she has recited it under hypnosis. Id. This tends to make the testimony more convincing to the factfinder, Id., and is known as "memory-hardening." Williams v. Armontrout, 877 F.2d 1376, 1380 (8th Cir. 1989). It is also important to scrutinize the particular effects of the post-hypnosis testimony because hypnosis causes not only memory-hardening, but also the creation of imaginary memories. Id.

To read Orndorff as disallowing consideration of credibility evidence in determining whether the denial of the right to confront the witness was harmful would conflict with Delaware v. Van Arsdall, 475 U.S. 673 (1986). Van Arsdall, like this case, concerned the credibility of testimony. In that case, the Supreme Court addressed whether it was harmful error to prevent the defendant from cross-examining the government's witness about an unrelated criminal charge against him. Id. at 676, 679. The government had dropped that charge in exchange for his agreement to talk with the prosecutor about Van Arsdall, potentially biasing the witness's testimony. Id. at 676, 684. In Van Arsdall, as here, the prosecution was allowed "to introduce evidence that was not subject to constitutionally adequate crossexamination." Id. at 684. In both Van Arsdall and this case, the prohibited cross-examination might have enabled the defendants to "cast doubt on the testimony of an adverse witness." Id. And, here, as in Van Arsdall, "the reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process at trial." Id.

Our task is to decide whether the error is harmless beyond a reasonable doubt. It must be harmless even "assuming the damaging potential of the cross-examination were fully realized." Van Arsdall, 475 U.S. at 684. To make this determination, we must consider the impact that the denied cross-examination would have had on Lehman's testimony, including its credibility. cross-examination of Lehman about the effects of the hypnosis on her recollections might have prompted the jury to disregard those parts of her testimony relying upon new memories that arose after hypnosis. See Orndorff, 707 F. Supp. at 1070. Thus, we must be able to consider the color, vividness, and detail added to the post-hypnosis testimony (which may have been the product of memory-enhancement techniques). Although our earlier opinion does not allow us to presume that the many additions to Lehman's statements in the post-hypnosis testimony

necessarily render the error harmful, it permits us to consider how the detail, color, and vividness affected both the substance and credibility of Lehman's testimony in this particular case. As the Court recognizes, those details which go to the behavior and attitude of the petitioners during the crime could have persuaded the jury to impose the death penalty.

Because I interpret Orndorff to permit the evaluation of the effect of specific changed or added statements that add detail on the witness's testimony, including its credibility, I would analyze under the Van Arsdall factors the testimony that the court declines to consider. See ante at nn. 11-20, at 14-15. I have therefore done so in reviewing Richley's claim.[3]

II.

In my view, the denial of the chance to cross-examine Lehman about her hypnosis was not harmless beyond a reasonable doubt with respect to the imposition of the death penalty on Richley I discuss the points on which the Court and I agree before turning to how I would apply the Van Arsdall case's fifth factor to Richley.

I agree with the Court's analysis of the first four Van

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[3]I have also considered this sort of testimony in reviewing the claims of Holmes and Clines. Specifically, I have evaluated the additions to testimony that made Lehman's account more detailed, and those that, by describing her feelings and thoughts during the crime, enhanced both her credibility and the horror of the crime. For example, I have considered Lehman's new trial testimony that she remembered feeling like she needed to calm down and regulate her breathing, and that she recalled "crunching up" when she heard the gunshots. New Statements 24-27. Although such statements are legally material under Orndorff, they make no difference as to Holmes and Clines. I believe the jury would have imposed the death sentence on them even without these additions to the testimony.

Arsdall factors.[4] I also agree that we must consider the fifth Van Arsdall factor — the overall strength of the prosecution's case — as to each defendant individually.[5] I further agree that we must determine the effect of the error on the factfinding process at trial, Van Arsdall, 475 U.S. at 681, that is, on the sentence obtained, see Chapman, 386 U.S. at 24 (applying harmless-error analysis to the "verdict obtained"). To do this here, we must compare the overall strength of the prosecution's case for the death penalty with and without the hypnotically enhanced testimony. That is, "we must examine the other evidence introduced at the trial" to determine whether it affected the sentence imposed. Lufkins v. Leapley, 965 F.2d at 1481 (citing Yates v. Evatt, 111 S.Ct. at 1892). Although.I agree with the Court's statement of the law, I disagree with its application of Van Arsdall's fifth factor in this case.

Richley first argues that Lehman's post-hypnosis testimony drastically altered the jurors' perception of his role in the death of her father. At trial, she testified that Richley left her while the shots were fired, suggesting that he was in the bedroom when her father was killed. New Statements 28 and 29, at App- 86-87. The State argues correctly that in her second pre-hypnosis statament, she said that she did not know

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[4]However, I would emphasize them more than the Court does. Lehman's testimony undoubtedly influenced the severity of Richley' s punishment because that testimony was almost the only testimony about Richley's behavior during the crime and his treatment of her and her family.

[5]I also agree with the Court's rejection of petitioner's argument that Yates v. Evatt, 111 S. Ct. 1884 (1991), overruled on other grounds, Estelle v. McGuire, 112 S. Ct. 475, 482 n.4 (1991), alters the harmless-error analysis in this case. Yates is consistent with the Van Arsdall test, particularly as an amplification of its fifth factor. Yates required a comparison of the probative force of the evidence the jury considered with the effect of the erroneous presumption given in the jury instructions. Id. at 1893.

Richley had stayed with her during the shooting. App. 48, 50. But neither did she know whether he had left — only that he "wasn't touching" her then. App. 48. Moreover, she said very clearly in her first pre-hypnosis statement that Richley stayed with her during the shooting. App. 17-18, 19, 36. She said that the three other petitioners were in the bedroom, App. 33-34, that Richley was not, and that he "had ahold of me the whole time." App- 34.[6] At trial, she bolstered her testimony that Richley had left her during the shooting and then came back; she described her remembrance of Richley's heavy walk and his boots upon his return. Changed Statements 13, 14, 47, and 48, at App. 87-88, 160-61. But before her hypnosis she had said that she did not see Richley's feet. App. 23. The placement of Richley by her side during the shooting is key to his defense, particularly since he had said that he did not want to be part of a murder and he wanted to let Lehman call an ambulance for her father. App. 38, 54. This change in testimony, increasing the likelihood that the jurors would think that Richley was in the bedroom during the shooting, may well have strongly influenced the jurors in selecting his sentence. In my view, this change was not harmless beyond a reasonable doubt.

Other post-hypnosis statements may have influenced the jury to impose the death penalty because they portrayed Richley as a leader, controlling Lehman and the other men. E.g., New Statements 3 and 9 (Lehman addressing specifically Richley in asking what the intruders wanted); New Statement 7 (asking Lehman who else was home); New Statements 10, 11, 71, 73, 78, and 79 (noting his reactions to the fight and directing Orndorff to go help in the fight); Changed Statement 18 (telling Lehman to hand her Christmas money to Orndorff);

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[6]At trial, she no longer recalled saying this. App. 191-92. Although this may be a normal memory lapse, it may well be attributable to the hypnosis.

New Statement 68 (recalling feeling that if she kept talking and searching for money, Richley might not shoot her). Juxtaposition of these post-hypnosis statements with the post-hypnosis placement of Richley in the bedroom at the time of the murder could also have influenced the jury in sentencing Richley to death.

It is true that Lehman's pre-hypnosis statements also showed Richley to be violent and a leader. E.g., App. 16 (telling Lehman to shut up); App. 18, 45 (leading her by her hair); App. 21 (pushing her hard, pushing gun against her head); App. 37 (Lehman stating that if anyone was the leader, it was probably Richley); App. 45-46 (carrying a gun). I still believe, however, that Lehman's trial testimony about Richley's location during the murder was very likely a decisive consideration in his sentencing (particularly since some of the jurors would have found his participation in the murder to be relatively minor and that of an accomplice, App. 257). Lehman's post-hypnosis trial testimony was vital to the prosecution's case for the death penalty and unique among the other testimony because of its detailed description of Richley's behavior and attitude while committing the crime. In my view, this testimony enhanced the strength of the prosecution's case for the death penalty and therefore is harmful, and reversible, error.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3510/3512/3513/3514EAPB

Michael Ray Orndorff, et al.,
Plaintiffs - Appellants,
vs.
A. L. Lockhard, etc.,
Defendant - Appellee.

* Order Denying Petitions for Rehearing and Suggestions for Rehearing En Banc

The suggestions for rehearing en banc are denied. Chief Judge Richard S. Arnold, Judge McMillan, and Judge John R. Gibson would grant the suggestion for rehearing en banc with regard to appellant Darryl V. richey.

The petitions for rehearing are also denied.

September 21, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
APR 29 1991
CARL R. BRENTS, CLERK
By: _____
DEP. CLERK

MICHAEL RAY ORNDORFF	PETITIONER
V.	NO. PB-C-84-300
A. L. LOCKHART, Director of the Arkansas Department of Correction	RESPONDENT
JAMES WILLIAM HOLMES	PETITIONER
V.	NO. PB-C-84-301
A. L. LOCKHART, Director of the Arkansas Department of Correction	RESPONDENT
HOYT FRANKLIN CLINES	PETITIONER
V.	NO. PB-C-84-302
A. L. LOCKHART, Director of the Arkansas Department of Correction	RESPONDENT
DARRYL V. RICHEY	PETITIONER
V.	NO. PB-C-84-303
A. L. LOCKHART, Director of the Arkansas Department of Correction	RESPONDENT

ORDER

Petitioners raised eight points in their own original habeas proceeding before me. I found merit only in the fact that the prosecutor failed to inform either defense counsel or

of the prosecutor was inherently prejudicial. Orndorff v. Lockhart, 707 F.Supp. 1062, 1069 (E.D.Ark. 1988). The Court of Appeals reversed, holding that if the assumed error was harmless, it could not be the basis for habeas corpus relief. Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990). The court of Appeals directed me to compare Vicki Lehman's prehypnosis statements with her trial testimony with "an eye toward sorting those things about which [Ms] Lehman could testify without aid of hypnosis (that is, from actual memory) from those things about which she could testify only after being hypnotized." Id. The Court of Appeals stated that "[u]nless this sorting process reveals significant variations, the error should be deemed harmless." Id. at 1232.

In compliance with the mandate of the Court of Appeals, I have carefully compared the two pretrial statements of Vicki Lehman with the trial testimony. Her accounts of the robbery-murder on the night of January 8, 1981 were given in question and answer form. The first interrogation was by Don Townsend, a Benton County Deputy Sheriff. It took place slightly more than three hours after her father was murdered and began a few minutes after 1:00 A.M. on the morning of January 9, 1981. The written transcript of the interrogation is twenty-six pages in length. The answers to the questions posed to Miss Lehman were intelligent and cogent. They were also concise. The second interrogation five days later on January 14, 1981 was conducted by the prosecuting attorney, David Clingor, also in question and answer form. The written transcript covered twenty-four pages. There is no material difference in the accounts given by the witness. There are a few inconsequential differences, which would be expected in interrogations on two different occasions. At any rate, the differences in the statements are not an issue because both were taken before hypnosis. The issue is whether there was significant variation between the trial testimony and the January 9 and January 14 statements.

In contrast to the other interrogations, Ms. Lehman's

trial testimony was one hundred forty pages in the trial transcript. Her direct examination consisted of 80 pages and the four crossexaminations consumed 60 pages. The in-trial questioning of Hiss Lehman was obviously much more detailed than the two prior interrogations. She had gone to her home and participated in a reenactment of the crime. Between her initial statements and the trial, the witness had eight months to reflect on events surrounding the murder without the enormous stress that must have surrounded the statements of January 9 and January 14—one right after the murder and the other right after the funeral.

The prosecutor, in preparing the trial testimony of his principal witness, obviously spent a great deal of time on his direct examination and went into more detail on events. He fleshed out the bare bones accounts of the earlier interrogations. Such a procedure is normal. Immediately after a crime, a police interrogator is interested in obtaining the essentials. On trial the prosecutor's efforts are generally directed toward presenting a full, interesting and detailed account of the crime to the jury.

I do not find the significant variation which the Court of Appeals has held to be necessary. In contrast to instances when the witness simply elaborated on her previous statements, petitioners point out several instances of variation between Ms. Lehman's trial testimony and her previous statements. For instance, she testified at trial as follows: "There were like three masked men and they all had guns and for an instant they were all pointed right at me." (T. 3029). It is true that in her initial interrogation, she stated:

Q. They got into the house. Then what happened?

A. Then a couple of them were wrestling with him, they just kind of rolled over to the edge of the dining room table and I was just standing there and I saw the

other two had guns on me.
(T. 4161-62). On January 14, she stated:

> Q. They got into the house. Then what happened?
>
> A. At that time I could see dad and I could see him pushing back at the door and I...and as I was going to start pushing back at the door with him then that' s when they all just came in. They were ... fjum over there I could see three of them just all standing there with their guns and I just said what do you want, I can remember saying what do you want and then they were just fighting with dad.

(T. 4190). Later she stated:

> Do you remember seeing any of those boys with guns in their hands? The two that were fighting with him?
>
> A. I can't recall. The only thing I can recall is whenever I saw the gun was ... I know two of them standing there at me holding guns.
>
> Q. And two of them fighting on the floor.

(T. 4206).

A close examination of this testimony illustrates that while the variation, if any, would be insignif icant, there is actually no inconsistency in the testimony. When she testified about the robbers having three guns, this related to the time when the men broke through the door into the house. When she mentioned that two of the men had guns on her, this referred to a later time when two of the four men were

wrestling on the floor with her father. At this later time two of the men had a gun pointed at her.

Petitioners point to such insignificant variations as exemplif ied in her trial testimony that "it seemed like the biggest guy was on dad first" (T. 3031), while in her January 14 statement, she stated, "I know there was one holding me and it was like there were two on him and . . there was another one just like standing over with a gun." (T. 4191). Again there was nothing inconsistent in these two statements. The f act that two of the men were wrestling on the floor with her father in no manner contradicts her statement that the big man was on her father first.

Another variation pointed out by petitioners is where the witness in trial testimony said, "I can remember the big guy going, 'Guns. Guns. We know you have guns.," (T. 3050). In the January 9 statement referring to the same incident, she said, "Then all three of them stood in front of me with all their guns and they said, 'Where's some money, where's some jewelry? Where's some guns? We know there's some guns here, where's some guns?' " (T. 4169). Her version in the January 14 statement was substantially identical. (T. 4200, 4203). I consider this variation insignificant, if it is actually a variation. That one of the men was identified as asking about the guns does not exclude the fact that the other two may have asked similar questions.

Another purported variation has to do with tail lights on the assailants' car. (T. 3054, 4169, 4186). This information was sought to assist in apprehension of the suspects and has no relevance to the crime and the punishment assessed by the jury. Similarly, in her initial interview, Ms. Lehman could not remember anything about the footwear of the man who was holding her. Like the tail light information, the police officer was making this inquiry to aid in the man's apprehension. It had nothing to do with guilt or punishment. This interrogation was made when the witness was under a great deal of stress. It is not surprising that she later could not remember every

detail about the man's appearance.

After carefully considering the three interrogations of Ms. Lehman, I have concluded that there is a remarkable consistency in her recitations on all three occasions. There are no significant variations in her trial testimony and the previous interrogations. The questions were more detailed and her answers were more detailed. Petitioners have failed to shoulder the burden established by the Court of Appeals. They have failed to show any significant variation in her prehypnotic and posthypnotic testimony.

The habeas petitions by Michael R. Orndorff , James William Holmes, Hoyt Franklin Clines and Darryl v. Richley are therefore denied and dismissed.

This 29th day of April, 1991.

/s/ Henry Woods
U. S. District Judge

SUPREME COURT OF ARKANSAS

Opinion Delivered JULY 5, 1983

No. CR82-54

HOYT, FRANKLIN CLINES, JAMES WILLIAM HOLMES, DARRYL V. RICHEY, and MICHAEL RAY ORNDORFF,

Appellants,

V.

STATE OF ARKANSAS,

Appellee.

APPEAL FROM BENTON COUNTY CITCUIT COURT

HONORABLE WILLIAM H. ENFIELD Circuit Judge

Affirmed

STEELE HAYS, Associate Justice

These four appellants were jointly tried and convicted of the January 8, 1981 capital murder of Don Lehman, a Rogers householder, and of the aggravated robbery of his wife and daughter. They were sentenced to death by electrocution on the capital murder charge and to life sentences on the two aggravated robbery charges. On appeal they allege a number of errors of law and procedure as grounds for reversal. Finding no error, we affirm the convictions and the sentences imposed.

I.

THE TRIAL COURT ERRED IN FINDING THE ARKANSAS CAPITAL MURDER STATUTE CONSTITUTIONAL.

Appellants make a four-fold attack on the constitutionality of the Arkansas felony murder statute, Ark. Stat. Ann. 541-1501(1)(a) (Repl. 1977), which provides that capital murder occurs if a person, acting alone or with others,

commits one of several felonies, including robbery, in the course of which either he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. Appellants argue that the statute is vague and overbroad; that it denies equal protection of the law inasmuch as there are currently twenty-three men, but no women, on death row; that the imposition of the death penalty is arbitrary and capricious because the prosecuting attorney is given discretionary power to waive the death penalty and because the jury must return a death verdict if find aggravating circumstances outweigh mitigating circumstances; and finally that our statutory scheme does not require the jury to consider the culpability of each individual defendant.

The vagueness argument has been raised and answered more than once. In Cromwell v. State, 269 Ark. 104, 598 S.W.2d 733 (1980), we pointed out that in the definition of criminal offenses some generalization is both unavoidable and desirable so that prosecutors and juries may have leeway to lighten the punishments that might be imposed for conduct that falls within overlapping offenses. (See Cromwell at p. 107).

The claim that the equal protection clause of the constitution is offended because men are given the death penalty disproportionately to women is raised initially on appeal and, beyond that, is supported by argument alone.

We disagree that juries are bound under our statutory scheme to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances. We have pointed out in several cases that whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. (See Williams v. State, 274 Ark. 9, 621 S.W.2d 686 (1981) and Ark. Stat. Ann. §41-1302(2)(c)). Additionally, because the

captial murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. Wilson v. State, 271 Ark. 682, 611 S.W.2d 739 (1981) This jury had that option.

The argument that prosecutorial discretion in seeking the death penalty is arbitrary and capricious has been dealt with by the Supreme Court of the United States (Bordenkircher v. Hayes, 434 U.S. 359 (1978)); and by us (Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980)). It needs no further review.

The claim that our statutory scheme does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, might be disposed of on procedural grounds, as the argument was not clearly raised below, i.e. we find no objection to the capital murder instruction consistent with their view of the law. Schwindling v. State, 269 Ark. 388, 602 S.W.2d 639 (1980). However, we choose to consider the merits of the argument.

Appellants cite Enmund v. Florida, ___U.S.___, 73 L Ed 2d 1140, 102 S.Ct.___, (1982). There, the Supreme Court held that death was a cruel and unusual punishment for one who had participated in a robbery during which murders were committed, but was not present at the killings and did not intend that the victims be killed. The court noted that the record supported no more than an inference that Enmund, the petitioner, was the person waiting in a car near the scene of a robbery. Two others had gone to the rear of a nearby farmhouse and, on a pretext of having car trouble, coaxed the victim outside to rob him. When the victim called for help his wife came out and shot one of the robbers. The two victims were killed in a gun battle and the robbers fled with their money to a waiting car.

Relying on the Eighth Amendment, the court held that one who does not intend that a robbery victim be killed, is not present when the killing occurs, and does not contemplate that lethal force will be used in carrying out the robbery, is not

subject to the death penalty. A Florida jury had found Enmund and a co-defendant guilty and recommended the death penalty for both defendants, which the trial imposed. Acknowledging the absence of any direct evidence that Enmund was present at the killings, the Supreme Court of Florida affirmed, explaining that the interaction of the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felons. As it did with death as a penalty for rape (see Coker v. Georgia, 433 U.S. 584 (1977)), the court reasoned that an overwhelming number of states and of American juries would repudiate the death penalty for crimes such as Edmund's.

Significant comments are in the opinion, first, that there was no evidence that Enmund had any intention of participating in, or facilitating, a murder and, second, the court emphasized that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." Here, a number of distinguishing factors immediately appear. At aabout 9:45 p.m., after he and his family had retired for the evening, Don Lehman answered a knock at his front door. He asked who was there and someone answered "David." His daughter, Vickie, also responding to the knocking, said as her father unlocked the door the four appellants, masked and armed, burst into the room with such force that her father was knocked backward off his feet and the doorknob of the front door was jammed through a closet door behind. Two or three of the appellants struggled with her father toward the bedroom, where Mr. Lehman was wrestled onto the bed and a fatal shot to the head and one to the abdomen were delivered.

There was direct evidence from more than one source that appellants had discusssed among themselves the necessity of murder if they met resistance; at least two of the appellants were armed with pistols, perhaps three of them, and the fourth with a lethal weapon fashioned from a metal chain. All four wore ski masks and all four burst into the Lehman home when the latch was opened. The proceeds, some $1200, were presumably divided to the appellants' liking. It must be noted, too, that Lehman was given no opportunity to yield, he was immediately attacked by appellants, sustaining blows to this head and face from the metal chain and a mortal wound to

the chest before reaching the bedroom.

Although perhaps only two of the appellants were in the bedroom when Mr. Lehman was killed, it cannot be ignored that when a group of individuals agree to execute a criminal enterprise involving the forced, nighttime entry of a private dwelling, known to be occupied, wearing masks and armed with pistols, intent on robbery, it follows that murder is a most probable consequence. We think the likelihood of a homicide under the circumstances is so substantial as to bring this case clearly within the quoted exception of the Enmund decision, on those circumstances alone. Added to that is the evidence that murder was plainly contemplated by the appellants. We conclude the blame for Don Lehman's murder rests with near equality on all of the appellants.

As a final response to this phase of the argument, we point out that there are added safeguards in our system against the arbitrary imposition of the death penalty. In Collins v. State, 261 Ark. 195, 548 S.W. 2nd. 106 (1977), we noted the power of the trial court to reduce a death sentence to life imprisonment and in that opinion we committed this court to a policy of comparative review, by examining the death penalty in every case on a comparable basis. We have demonstrated our readiness to modify the death sentence where it is imposed capricsously (see Sumlin v. State, 273 Ark. 185, 617 S.W. 2d 372 (1981)) , or where the culpability of co-felons is disproportionate (see Henry v. State, 278 Ark. 478,___S.W.2d___(1983), or where death is unduly harsh under the circumstances (Neal v. State, 274 Ark. 217, 623 S.W. 2d 191 (1981) and Giles v. State, 261 Ark. 413, 549 S.W. 2d. 479 (1977).

We are not overlooking the suggestion that Michael Orndorff's particpaatioon in the crime was half-hearted; that he may have asked to be taken home as the appellants were leaving the Baker residence; and that after the shooting he disclaimed any wish to be involved in a murder. But the jury unanimously rejected as a mitigating factor that any appellant played a minor role. Too, Orndorff's request to be taken home may have been due to Steve Baker's having declined to go along, rather than because of any compunctions over the undertaking. And his belated comment antagonistic, but that claim cannot be supported. We find no effort among the defendants to point to another defendant as the murderer;

the proof on behalf of each defendant (only one of whom testified) was aimed for the most part at proving he was not in the bedroom, where the murder occurred. These defenses are not in the least antagonistic in the same sense as in McDaniel.

The final and essential difference is that the McDaniel case had the added element that where culpability was distinctly dispproportionate, the jury was admittedly unable to decide which of the two defendants committed a heinous act, resulting in two defendants being convicted of capital crime for which only one may have been guilty. Whereas here, there is substantial evidence, indeed overwhelming evidence, that all four appellants planned and executed a robbery, expressly deliberating on nurder as a possible consequence. Nothing in this record suggests that for these appellants to be tried jointly resulted in substantial injustice and we find no abuse of discretion in the trial court's refusal to grant separate trials.

III.

THE USE OF A DEATH QUALIFIED JURY IN THE INSTANT CASE DENIED THE APPELLANTS AN IMPARTIAL JURY ON THE ISSUES OF GUILT AND PUNISHMENT AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The gist of this argument is that when those members of a jury panel holding religious or conscientious scruples against capital punishment are eliminated, the cross-section of the population which remains is not impartial and unbiased on the issues of guilt and punishment. They are, it is urged, favorable to the prosecution and, hence, guilt prone. The argument is not new and needs no reiterration. It has been considered and rejected here as well as in the Supreme Court of the United States. Witherspoon v. Illinois, 391 U.S. 510 (1968); Miller v. State, 269 Aark. 341, 605 S.W. 2d 430 (1980).

IV

THE JURY SELECTED IN THE INSTANT CASE WAS NOT SELECTED IN ACCORDANCE WITH THE STANDARD

PRESCRIBED IN WITHERSPOON AND HOBBS.

The Witherspoon rule, as interpreted in Hobbs v. State, 273 Ark. 125, 617 S.W. 2d 347 (1981) permits the exclusion of persons as prospective jurors only if they irrevocably oppose or favor the death penalty regardless of the evidence. Appellants insist that two of the veniremen, Mrs. Kaiser and Mrs. Dick should not have been excused for cause because of their uncertainty as to capital punishment and Mr. Harley Wood, who showed some preference for it, should have been excused for cause.

We have examined the questions asked in voir dire and the responses given and, typically, no clear conclusion can be drawn. The answers arre tentative or equivocal, and the trial court is in a better position than we are to gauge the attitude of the veniremen and decide whether each will weigh the evidence and, if appropriate, will consider all the penalties provided by law. We cannot say his discretion was used wrongly in any instance complained of. Hulsey v. State, 268 Ark. 312, 595 S.W. 2d 934 (1980); McCree v. State, 266 Ark. 465, 585 S.W. 2d 938 (1979).

V.

THE TRIAL COURT ERRED IN LIMITING THE APPELLANTS TO A TOTAL OF TWELVE PEREMPTORY CHAALLENGES.

The trial court limited the four defendants to a total of twelve peremptory challenges, which they claim is error. We have held in three cases that where defendants are tried jointly each defendant is not entitled to the full allotment of peremptory challenges, but a challenge by one is a challenge by all. Williams v. State, 267 Ark. 527, 593 S.W. 2d (1979); Lewis v. State, 220 Ark. 914, 251 S.W. 2d 490 (1952); Hearne v. State, 121 Ark. 460, 181 S.W. 2d 291 (1915).

No absolute right to peremptory challeges exists under the constitution. Stilson v. United States, 250 U.S. 583 (1919) and we see no prejudice resulting from the position we have taken in the earlier decisions. The right to challenge a prospective juror on peremptory grounds may be exercised simply because counsel has reservations that certain groups

might be skeptical of its theory of the case; it is a very general response and such criteria as occupation, education, age, residence, social background, sex, and even facial expression, may influence its use depending on the nature of the case. But ordinarily these considerations are applicable to the defendants as a whole and not individually. Here, it appears the peremptory challenges were exercised collectively by the defense, as might be expected, and no argument is offered that for a specific reason no prospective juror was objectionable to one of the defendants, though not to the others. We adhere to our holding in Williams v. State, supra.

VI.

CALLING A FIVE DAY RECESS AT THE CLOSE OF TESTIMONY WAS AN ABUSE OF THE COURT'S DISCRETION.

Appellants allege that it was an abuse of discretion for the trial court to order a five day recess as the trial was nearing a close. The recess occurred, evidently, between the taking of testimony and the instructions and arguments, because of the trial judge's scheduled participation in a meeting of the Arkansas Judicial Council. The trial seems to have commenced well in advance of th meeting, but moved at a slower pace than expected. Such matters as recesses and sequestration of the jury are not amenable to inflexible rules and must be governed to a great extent by the exigencies of the day and the calendar. We see no reason why it would work to the appellants' greater prejudice to recess from Wednesday to Monday, than from Friday to Monday, as often occurs in trials. We find no abus e of discretion.

VII.

IT WAS ERROR FOR THE JURY TO FIND THE AGGRAVATING CIRCUMSTANCE THAT, "IN THE COMMISSION OF THE CAPITAL MURDER, EACH OF THE APPELLANTS KNOWINGLY CREATED A GREAT RISK OF DEATH TO A PERSON OTHER THAN THE VICTIM."

Citing Williams v. State, 274 Ark. 9, 621 S.W. 2d 686

(1981), appellants contend that because Vickie Lehman and Virginia Lehman were victims of the underlying felony of aggravated robbery to the capital murder of Don Lehman, the evidence will not warrant a finding as an aggravvvating circumstance that appellants knowingly created a great risk of death to a person other than the victim. Appellants assert thatt Williams v. State, supports the argument. but fail to explain how. The holding there has no particular relevance to this case. Williams' death sentence was reduced because one of the aggravating circumstances found by the jury, commission of a prior felony, did not involve violence as requied by Ark. Stat. Ann. §41-1303 (Repl. 1977). The decision also holds that where a jury finds no mitigating circumstances and three aggravating circumstances, one of which is erroneous, we will not regard the error as harmless simply because two aggravating circumstances remain as we are not in a position to speculate as to what a jury would do on a finding of two aggravating factors instead of three.

The appellee submits that this point was not preserved by an objection to the instuctions or to the verdict forms. Without implying that the point is otherwise meritorious, we decline to consider it for the lack of proper objections.

VIII.

IT WAS ERROR FOR THE TRIAL COURT TO PERMIT THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES AND ACTS AGAINST APPELLANTS CLINES AND ORNDORFF.

Mrs. Tammy Baker was called by the state to prove that the appellants had been at her home the evening of the Lehman murder, drinking beer and playing cards with her husband, Steve Baker. She said when she answered the door the four appellants were there, that one was wearing a ski mask and stuck a gun in her face. She was ordered to "stick 'em up" , before realizing that a joke was being played. The four stayed until about 9:30 p.m. and she overheard discussions involving the robbery of someone who lived nearby.

On cross-examination she was asked by counsel for one of the defendants, Clines, whether her husband was then facing charges of robbery committed the night before the Lehman crime. She said he was and was then asked if any of

the appellants were involved and she said Orndorff and Clines were. Orndorff's objections to this line of questioning were overruled and when Steve Baker followed his wife to the stand the state was permitted to go into the incident in greater detail.

Appellants Clines and Orndorff complain that the admission of this evidence, as well as a statement by Billy Weaver that Darrell Richley told him he was the one who shot Don Lehman, that he had been involved in "stealing and robbing", violate the rule against admitting evidence of prior bad acts, citing, Alford v. State, 223 Ark. 330, 266 S.W. 2d 804 (1954). But the Weaver comment was admitted with an admonition to the jury in accordance with the purposes of Rule 404(b), Uniform Rules of Evidence, and the Baker testimony has to be examined in light of the fact that it was Clines' lawyer who pointedly asked the questions that brought the evidence into the trial. Whether the object was to discredit Tammy and Steve Baker's testimony by showing that Baker was charged with similar conduct is speculation, but we are not persuaded that reversible error occurred. It is entirely possible that the evidence would have been received by the trial court under Rule 404(b) had it been offered for the purpose of proving identity, opportunity, intent, preparation, or absence of mistake. Cetainly the evidence of a robbery involving similar methods committed in close timing with the offense on trial had probative value. The prejudicial aspect is not so obvious that we can say the court was clearly wrong.

IX.

IT WAS ERROR FOR THE COURT TO ALLOW THE JURY, IN THE SENTENCING PHASE, TO FIND APPELLANTS CLINES AND ORNDORFF HAD "PREVIOUSLY COMMITTED ANOTHER FELONY, AN ELEMENT OF WHICH WAS THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON OR CREATING A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON" ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

After the appellants' guilt had been established and the penalty phase of the trial was in progress the state was permitted to prove one of the seven aggravating circumstances

listed in Ark. Stat. Ann. §41-1303 (Repl. 1977) by the testimony of Steve Baker that he, Clines and Orndorff had previously committed another felony by the use or threat of violence. Baker said the three of them robbed Barry Cobbs, and Tim Pettyjohn at gunpoint on January 7, 1981.

Appellants charge that since Steve Baker was an accomplice in the alleged robbery the penalty procedure violated the rule incorporated in Ark. Stat. Ann. §43-2116, that a conviction cannot be had in any case upon the testimony of an accomplice unless there is corroboration other evidence. As Steve Baker's testimony was not corroborated, appellants claim thatt error resulted. The argument connot be sustained, if for no other reason than the fact that §43-2116 deals with grounds for conviction, whereas §41-1303 deals with proving that a crime of violence was previously committed. Beyond that, in Miller v. State, supra, we held that the same degree of proof is not required to sustain a finding that an aggravated or mitigating circumstance was a separate crime. (Miller at p. 355). We said that if there was evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

X.

THE TRIAL COURT ERRED IN ADMITTING THE TENNIS SHOES OF THE APPELLANT CLINES.

We need not delay unduly with the issue raised by this argument, as the admission of the evidence itself was of little or no consequence. An investigating officer testified that he took an impression of a foot print from a flower bed of the Lehman home; that there was a high degree of probability that it matched Hoyt Clines' tennis shoe, however, he said it was impossible to be absolutely certain. But Clines presence at the scene in company with the other appellants was amply evidence by other proof and no objection to this evidence was offered until the trial, as required by A.R.Cr.P. Rule 16.2.

XI.

THE TRIAL COURT ERRED IN NOT GRANTING A MIS-

TRIAL FOR TESTIMONY CONCERNING IMPLICATING OUT-OF-COURT STATEMENTS OF A CO-DEFENDENT, DARRYL V. RICHLEY, REGARDING APPELLANT CLINES.

Freddie Barker was called by the state to prove that Darryl Richley came to his home a day or two after the crime involving the Lehman family to ask his help in selling the guns taken from the Lehman home. Richley, he said, talked about his part in the murder, and told him four of them went to the door with ski masks and "busted on in", that one of the four started whipping Lehman with a motor chain belt, who made a break for the bedroom "and the guy pulled his mask off and kept hitting him. He said he got on the bed and that (Richley) shot him and said the guy kept going for a gun above the bed and he said he put the gun up to his head and shot him." The questioning continued at length, with no other reference to the removal of a mask, and not until the state fully completed its interrogation was any objection made. At that point counsel for Hoyt Clines moved for a mistrial on the grounds that there was previous testimony that it was Clines who had removed his mask and hence Clines was deprived of his right to confront opposing witnesses. This argument lacks merit, as objections must be timely, Earl v. State, 272 Ark. 5, 612 S.W. 2d 98 (1981), and mistrials should be declared only when the trial court is certain the trial cannot, in fairness, continue. Floyd v. State, 278 Ark. 86,___S.W. 2d___(1982).

XII.

THE EVIDENCE OBTAINED FROM THE SEARCH OF APPELLANT RICHLEY'S CAR AND APARTMENT SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE AND THE CONSENT TO SEARCH GIVEN BY RICHLEY WAS NOT GIVEN VOLUNTARILY.

Appellant Richley urges that the affidavit for the search warrant was deficient in that no underlying circumstatnces for the affiant's conclusions were stated. He also argues that his consent was not voluntary. However, the search warrant and affidavit are not abstracted, as required by our rules, and

the trial court found the appellant did give a lawful consent to the search. An independent determination of that issue has been made on review and we are satisfied the trial courts finding was entirely consistent with the evidence, particularly in view of Richley's testimony.

Finally, under A.R.Cr.P. Rule 36.24, and our rule 11(f), we find the treatment of other objections of appellants which were overruled, as well as rulings adverse to appellants, do not contitute reversible error. On a comparative basis we are not disposed to say the death penalty in this case is so wantonly, arbitrarily or freakishly imposed, or so excessive in relation to the crime, that we are compelled to modify the verdicts. There was sufficient evidence to support the findings of aggravating circumstances which were not outweighed by mitigating circumstances. We are satisfied the jury's verdict was relatively free of passion or prejudice. Accordingly, the judgments and sentences are affirmed.

Purtle J. dissents, Dudley, J., concurs in part and dissents in part.

Supreme Court of Arkansas

No. CR 82-54

HOYT FRANKLIN CLINES, JAMES WILLIAM HOLMES, DARRYL V. RICHLEY, and **MICHAEL RAY ORNDORFF,**

APPELLANTS

V.

STATE OF ARKANSAS,

APPELLEE

Opinion Delivered JULY 5, 1983

APPEAL FROM BENTON CIRCUIT COURT
WILLIAM H. ENFIELD, Judge

DISSENTING IN PART
CONCURRING IN PART

ROBERT H. DUDLEY, Associate Justice

The State adduced overwhelming evidence that the four appellants were guilty of jointly committing a capital murder and two robberies. Their individual defenses were not mutually antagonistic. Although the charges were joined and the appellants were jointly tried, the appellants as well as the State were afforded a just and fair proceeding through the accusatorial phase of the bifurcated capital murder trial.

However, that holding does not mandate the conclusion that the due process protections were sufficiently afforded at the joint sentencing phase of the capital murder trial. The two phases of the bifurcated trial serve vastly differing purposes. The essence of the accusatorial phase is the formal adversary presentation of evidence relative to guilt. The adversary concept places the State and the accused on an equal footing and so, in fairness to the State, joint trials are oftentimes required through this stage. Markedly different, the essence of the sentencing phase is the search for relevant information to choose whicch of the two penalties, life without parole or death, is appropriate for the person already found guilty. This second phase search for information is not based upon the same adversary concept. Our applicable statute provides that mitigating circumstances may be presentedd regardless of their admissibility under the rules of evidence

while aggravating cirsumstances may be presented only when they are admissible under the rules of evidence. Ark.Stat.Ann. § 41-1301(4)(Repl. 1977). The underlying reason for this is that the penalty of death is qualitatively different from all other punishments.

When the death penalty is sought, justice demands individual, not joint, sentencing. It is for this same reason that mandatory death sentences for particular crimes have been declared unconstitutional. Gregg v. Georgia, 428 U.S. 153 (1976). It is only after a structured exercise of discretion which guarantees individual sentencing that the death sentence may be imposed. Proffitt v. Florida, 428 U.S.242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). Accordingly, after a finding of guilty of capital murder, juries in this State may impose a sentence of death only after considering aggravating and mitigating circumstances. Ark.Stat.Ann. §§ 41-1301 & 1302 (Repl. 1977). Aggravating cirsumstances are principally related to the personal history of the individual defendant and not to the nature of the crime committed. Ark.Stat.Aann. § 41-1303 (Repl. 1977). Mitigating circumstances are totally related to the personal background of the defendant. Id. Individualized sentencing requires structured detailed consideration of the personal history of the guilty person before the death sentence may be imposed. Any impediment to that individualized exercised of discretion is violative of the protection of due process.

The clear issue is whether the joint sentencing procedure used in this case afforded each appeallant the structured and detailed consideration of his individual background which is required before the sentence of death may be imposed. Surely no one can doubt that when the jury was sent out of the courtroom to fix the punishment for four guilty persons at one sitting, that after fixing the penalty for the first three at death, there was a great reluctance to give the fourth a lesser sentence. Such reluctance alone might arbitrarily mandate a fourth death penalty for the particular crime regardless of the guilty person's personal history. This impediment to the individual exercise of discretion violates due process and the prohibition against arbitrary death sentences.

Such a scenario may well have occurred in the case at bar. In the sentencing phase appellant Clines was shown to

have pleaded guilty to burglary, a non-violent crime. No other convictions or felonious actions were shown to have been committed by him during the stage of the triaal. The only other proof of a prior bad action, for which there was no conviction, came during the accusatorial phase of the trial when aan accomplice gave uncorroborated testimony on a collateral matter. Yet, he, too, was given the death sentence.

For this reason I dissent from that part of the well writted majority opinion which affirms the jointt proceeding to fix the punishments at death. I concur in that the part of the opinion affirming the life sentences for the aggravated robberies.

Supreme Court Of Arkansas

HOYT FRANKLIN CLINES, JAMES WILLIAM HOLMES, DARRYL C. RICHLEY, and MICHAEL RAY ORNDORFF,	No. CR 82-54
	Opinion Delivered
APPELLANTS,	APPEAL FROM BENTON COUNTY CIRCUIT COURT; HON. WILLIAM H. ENFIELD, JUDGE.
v.	
STATE OF ARKANSAS,	DISSENT
APPELLEE.	

John I. Purtle, Associate Justice

I believe at least once of the appellants, Michael Orndorff, was prejudiced by the trial court's refusal to give him a seperate trial. To grant him a separate trial would have in no way selectively excluded him from culpability in regard to the crime for which he was convicted. In fact it seems to me that holding him to trial with the actual murderers pratically insured his conviction. Guilt by association is a common human error and in this case I have no doubt it played a big part in the minds of the jury who meted out indentical convictions and uniform penalties to all four appellants.

When each of the appellants attempted to place himself outside the bedroom where decedent was shot the result was that each defendant put before the same jury a defense inconsistent with the other defendants' defenses.

The majority opinion seems to infer some type of guilt from some of the appellants' failure to testify. If the trial court did this we would vote unanimously to reverse and remand. The trial court should have granted a severance.

A total of twelve peremptory challenges were allowed the four defendants. One of them did not get to exercise a single peremptory challenge. Had they been tried separately each would have been allowed twelve challenges. Therefore, these appellants were denied rights which are extended to others tried separately on identical charges. There is nothing to prevent a trial judge from allowing more than twelve peremptory challenges if fairness and impartiality demand it.

Furthermore, it was clearly prejudicial to allow

evidence of crimes for which the appellants had not been convicted even thought this was during the sentencing phase of the bifurcated trial. What happened to the old law that held every individual is presumed innocent? Soon it will be legal for the state to charge an accused of spurious crimes in order to help secure a conviction. For all we know none of the appellants were or will ever be found to have committed the alleged crime which was used during the sentencing phase.

I am still of the opinion that a death qualified jury is not comprised of a cross-section of the population as required by the Constitutions of Arkansas and the United States. It appears to me that there is a misunderstanding of the Witherspoon doctrine when prospective jurors are excluded because of religious or moral scruples against the death penalty. Perhaps some member or members of this very court have religious or moral scruples against the death sentence, yet we affirm such sentences if we find no reversible error. One who does not believe in the death sentence may honestly and conscientiously vote for such a sentence in upholding the law. For these reasons I must dissent to the majority opionion.